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PARTISANSHIP IN THE SUPREME COURT.

MR. WHYTE, of Maryland, has drawn the attention of the country to a subject that has been too long neglected, by a joint resolution, read in the Senate, to amend the Constitution of the United States so as to fix permanently the number of judges of the Supreme Court.

The number of the judges of that court is not prescribed in the Constitution. Indeed, no reference is made to the question whether the court is to be composed of one or more judges, except in the sixth section of the third article, in which the "Chief Justice" is required to preside on the trial of an impeachment of the President of the United States. If it had been intended that the Supreme Court might be composed of a single judge, the office of Chief Justice would not have been mentioned *es nomine*.

The framers of the Constitution were very trustful of the patriotism and political integrity of the future generations of the American people. More so, indeed, than their conduct has justified. In leaving this great department to be supplied with such officers as the President should appoint, "by and with the advice and consent of the Senate," there was a most forcible declaration that the officers and department are not representatives of the people, in the common acceptation of the word. The courts do not represent the people as legislators: they judge between them. The life tenure of the judicial office removes them from all direct responsibility to popular will. The only power over the judges that is reserved, in any form, is the power of impeachment, which is conferred by the Constitution upon the House of Representatives, and the jurisdiction to try the impeachment, which is conferred upon the Senate. Two-thirds of the members of the Senate present must concur in a judgment of

conviction before the impeached judge can be removed and disqualified from holding office. This is as far as the people have any control of the conduct of the judges, either directly or indirectly, except to provide, through their representatives, laws for the further punishment of their offenses; but these are to be tried by the judiciary. It is needless to argue that the purpose of this strictly guarded sanctity and immunity of the judiciary is to secure its independence of the people.

The independence of the judiciary, when coupled with the supremacy of their power, and the inviolability of their decrees in the field of jurisdiction assigned to them, seems almost to lift them to a height of authority that is too autocratic for harmonious companionship with the other departments of a republican government. But these high powers conferred upon the judiciary are of the very essence of free government, because they are necessary to give practical force and effect to the laws which they themselves establish. It behooves a free people that their judges should be above the "influence of fear, favor, affection, reward, or the hope thereof," so that justice shall not be denied to the poor or the humble man, or sold to the rich; and that it be not biased by the hope of favor, or the fear of giving offense to popular sentiment, or political power.

Having, of necessity, placed our judicial department on this high plane, and being powerless to control it, as we can control the other departments of the government, by the direct influence of popular will expressed in elections, we have no effectual means of preserving its purity, or of restraining it from the exercise of an arbitrary power within its own limits of jurisdiction. The almost ineffectual power of impeachment is a poor remedy for judicial abuses. In Judge Peck's case, the House of Representatives impeached him of a high misdemeanor in office, without one dissenting voice, but the Senate refused to convict him. Without intimating that either of the Houses was at fault in the matter, this precedent is a very clear proof of the weakness, the nothingness, of the strongest current of popular opinion, when it is directed to the removal of a judge from office.

Being compelled to give to the judiciary the highest powers, and to retain the least possible control over the judges and the courts, for the sake of having a supreme and independent arbiter of justice in our free system of government, we cannot be too watchful of the moral forces that we may employ in guarding

the purity of the bench, or too jealous of evil influence in the selection of men who are to fill these high offices.

Mr. Whyte's proposed amendment of the Constitution goes to the bottom of the subject, or as near to it as we can get, when it proposes to deprive Congress of the power to increase or diminish the number of the judges of the Supreme Court at its pleasure.

It would, perhaps, improve the proposed amendment if it was made the duty of Congress, when necessity requires, to increase the number of judges above a fixed basis, in ratable proportion to the increase of our population and the number of States in the Union; but this has nothing to do with the principle involved. Mr. Whyte gives the following brief history of the changes we have made in the numbers of the judges of the Supreme Court:

"The instability of the present method of fixing the number of judges is made manifest by a brief review of the course of legislation on the subject since the establishment of the court.

"By the original act of 1789, the Supreme Court was to be composed of six judges; in 1801, an act was passed providing that the number should be reduced to five on the first vacancy, but this act was repealed in 1802.

"In 1807, an act was passed providing for an additional associate judge. By the act of 1837, the number of associate judges was increased to eight, and by act of 1863 to nine, and that act provided that the Supreme Court of the United States shall hereafter consist of a Chief Justice and nine associate justices.

"The act of 1866 reduced the number of the whole court from ten to seven, while the act of 1869 fixed the court as consisting of a Chief Justice and eight associate judges.

"With this changing composition of the court, the time may come when the confidence of the people in this great tribunal may be shaken.

"In a popular government like ours, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done."

There was scarcely an instance in this curious legislative history relating to the Supreme Court where the reduction or increase of the number of judges was not directly the result of an effort to secure a well-defined and clearly understood purpose of political strategy. In some instances the identical purpose of the change was too obvious for concealment, and the expected decision of the majority of the court followed the change too closely to leave a doubt of the purpose.

Within a few years after the organization of the Supreme Court, the rival political parties of the country began to claim it as a right, and to urge it as a party duty, to put judges on the

bench who were decided, able, and zealous in their support of party measures and party declarations of political principles. It would be very difficult, in recent times, to cite a single exception to this rule. It has now become as positively established as that the President will select his cabinet from the party that elected him, and there is little hope that this rule will ever be changed.

This is a dangerous movement against the independence of the bench, and a fearful temptation to its integrity. When this practice first demanded tolerance from the people, the evils that were to follow were not so apparent as they are at this time. Then the rival political parties more frequently alternated in the control of the government; and the appointments to the bench were more evenly balanced between them. The life term of these offices also prevented the evil of sudden changes in the incumbency, to correspond with the changing fortunes of political parties. But the causes that then reduced the evils of a pernicious principle to a minimum, now operate to increase those evils into a serious danger to the country. The civil war excluded one-half of the country from representation on the bench; the life tenure of the judges makes them permanent in office; the President appoints only such as are fixed and immovable in their party relations; and Congress increases or reduces the numbers whenever it may be necessary to obtain the judicial sanction of such measures as may be desired to perpetuate the power of the party in authority. Congress and the President, acting together for the purpose of building up and confirming the strength of a party, have taken control of the Supreme Court, and will only permit such men to sit upon that bench as will make it their business to keep in line with and sustain all great party movements.

It is at this point, and in this way, that the independence of the bench is to be destroyed; and with the loss of its independence, its impartiality must be lost and its purity tarnished.

Some very corrupt men have been independent and impartial judges, and some very pure men have been servile slaves on the bench. Whether pure or corrupt in his personal character, the independent and impartial judge is much safer than a cowardly suppliant for party favors.

Mr. Whyte has taken the first necessary step in protecting the independence of the bench, by his proposition to cut off the power of Congress to increase the number of judges whenever

certain men are to be rewarded for party services, or certain questions are to be decided a certain way by a packed court, in order to sustain a party in measures that are designed to give it power and perpetuity in control of the government.

He has gone as far, perhaps, as it is possible to go with positive measures in this direction. The rest must be left to the President and the Senate, and to the moral force of the people.

The present time is a great epoch in the history of the Supreme Court. Within a period of six months, it is more than probable that four of the judges will have retired from the bench. Two of them are now the oldest and most distinguished men of that great tribunal.

One of the vacancies has been filled in strict accordance with the idea that the bench must be occupied by those alone who "belong" to the Republican party. It is not expected that the remaining places will be filled with any other than the ablest, wisest, most faithful, and most zealous members of that party. The President would sadly disappoint four million five hundred thousand people if he should select even one of the judges from the body of the other four million five hundred thousand people who vote the Democratic ticket. Or if the Senate, which is Democratic, and is likely to remain so for four years, or longer, should decline to "advise and consent" to the exclusion of all Democrats from the bench, the men who compose the Republican party will probably consider that it was an act of revolutionary hostility to the government.

Assuming, therefore, that the President will nominate only Republicans to the Supreme bench, and that the Democrats will consider it their duty to advise and consent to such selections out of mere deference to the President, we will, within six months, have a bench of eight Republicans and one Democrat, and after that we shall be silenced in the Supreme Court, as we will be ignored in the Senate, if, in the providence of God, one of the judges or either of four senators should be removed.

However good, or learned, or great these four new judges may be, there is not one of them who will be permitted to feel that his elevation to the bench is due alone to his superior qualifications of integrity, learning, and abilities. They will know that each of the four men is not greater, or better, or wiser than all the men in the Democratic party who are qualified for such places, and they will feel the full weight of the fact that their

selection is really owing to their fidelity to the Republican party. Going upon the bench with this conviction, they will be more than men if they maintain perfect independence of thought and impartiality of judgment.

It is supposed, or rather it was supposed, that a man who has been raised to the Supreme bench would be free from all temptation to decide questions in accordance with the expectations of his political associates.

This may yet be true in point of fact, but such is not the opinion of the people. In other days, as well as in this day, they have gravely suspected the bench. The Dred Scott decision, the Legal Tender cases, the decisions of the Electoral Commission, and the cases construing the election laws, and the right to punish State judges for obeying constitutional State statutes, have, in their turn, greatly impaired the confidence of many people in the independence of the judges of the Supreme Court.

This is a deplorable fact, and it may be discreditable to the people, but the fact would never have been possible if the people had not known that the Supreme bench had been used by politicians as a means of dispensing rewards for political services.

It is natural to expect a grateful return for great favors, and there is disappointment when it is withheld. Congresses, and Senates, and Presidents have used the Supreme bench as constituting a part of the political machinery of the great parties of the country, and the people have naturally expected that such a course would lead to the worst possible results.

There is no constitutional barrier to the aspirations of the judges to political power. When the judges of the Supreme Court decide questions that affect the prospects or places of political parties, they are at once open to the suspicion that they are influenced by personal considerations, or that they are serving their party on the bench.

This is not the fault of the people. It is the fault of a loose system of constitutional provision to control the number of the judges, and of a vicious practice in making appointment that fails to protect them against temptation. The Constitution should provide, and public opinion should earnestly support the provision, that a judge, appointed for life, should be consecrated for life to the service of the country only in a judicial calling. They are not thus consecrated to this high calling, but while on the bench they continue to be politicians, and are frequently drawn

into political controversies that impair their influence and characters as judges.

The service of the judges of the Supreme Court upon the Electoral Commission, without reference to the side on which they aligned themselves, was the most injurious misfortune that ever befell the bench. Since that event, no American citizen has had a doubt that the judges would stand by their party in every question that would materially affect its success.

So long as it is the undeviating practice to appoint judges who are distinguished for their fidelity and activity in party service, rather than for the qualities that enable them to rise above the demands of a party, and to do impartial justice to all men of all parties, it is not to be expected that the decisions of the courts will receive that respect and reverence from the people which are so essential to the peace, honor, and welfare of the country.

Such a policy in reference to judicial appointments keeps the judges always in the presence of temptation. The people witness the fact, and naturally attribute to the influence of temptation what may be a pure and disinterested act. They see the whole political power of the country concentrated on the effort to secure a political judiciary that will be under party control, and when it is accomplished, they are ready to regard the bench as merely a part of a great political machine.

The dangers of a political judiciary to the liberties and lives of the people are fearful to contemplate.

The bloody assizes in England, in the reign of James II., were the result of the employment of the judiciary to execute the will of a politician.*

Nothing was ever so fierce, cruel, and unrelenting as a judge who sets out to serve a political master. Secured from all personal danger by the sacredness of their offices, and having the power to condemn people to death who are, under our laws, even denied the right of appeal from their decision, judges who are the servants of a political party are more to be dreaded than war, famine, or pestilence in a country.

Every patriotic heart must constantly utter the prayer that

* "The Chief Justice's campaign in the west," as his cruel master called the bloody progress of Jeffreys, was only a less mild, but not a less political, campaign than some judges have prosecuted here, at the behest of a political party.

God will deliver our country from such evil, and yet every political agency is as constantly at work to produce this evil.

In every State, and in the federal government, in all appointments to judicial offices, from a justice of the peace to the Chief Justice of the United States, the political departments claim the right to fill the judicial departments with their henchmen. There is scarcely an exception that can be named.

All the other departments are allowed to appoint their own servitors and inferior officers, but the political departments exclude the judiciary from this privilege, except as to the clerks of the courts. They retain the power to appoint and remove at pleasure the district attorneys, and the marshals of the courts, who in turn appoint their deputies and bailiffs. Under such conditions the judges, whether State or federal, must be, and are, the mere dependencies of the political departments, and it is a marvel that they have any remaining sense of their independence, and of the dignity of their offices.

Their independence of party control, in questions of political character, is almost destroyed, and it is for this reason that every judgment they render in such cases is censured as a corrupt act by one party, or denounced as treason to party faith by the other. Whether their judgments are just or unjust, the people trace them back to the causes which led to the appointment of the judges, and approve or condemn them accordingly. This appears to be an extremely unjust attitude in which the people are found with reference to the judges, but that it is generally true is quite beyond denial; and a brief allusion to the facts which have forced them into this unhappy conviction will tend strongly to justify the opinions they have formed. With very few exceptions, if indeed there are any exceptions, all the judges who have been appointed to the federal bench since 1865 have been members of the same political party. And so it has been with reference to the district attorneys and marshals. The most assiduous care has been taken to keep the entire judicial department in the control of the Republican party, and it has been the most faithful and efficient agency that party has ever employed to conduct its political movements. It has taken charge of elections, and to carry them has terrorized communities and States, as well as individuals. It has issued decrees to disband legislatures, and to organize others, and has summoned the army and navy to execute its orders.

This rigid policy of excluding Democrats from all places connected with the judicial administration of the laws, shows that it is only the success of the opposing party in holding on to power that is sought to be secured in the appointment of the judges. The settled determination of the political departments is to rule in and over the judiciary with severe and unrelenting control.

That great conservative department in every State, and in the federal government, without which, as an independent department, those governments would not be republican even in form, is made the facile subordinate of the political departments, whose history is filled with crime and debauchery.

The department which was created for the purpose of expounding the laws and the Constitution; whose jurisdiction is expressly extended "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority . . . to controversies to which the United States shall be a party," and "to controversies between two or more States"; and to which is intrusted the whole "judicial power of the United States," has been brought into such subjection to the political departments that all its officers are expected, and by no means in vain, to follow the politicians in every exposition of the Constitution which they may adopt in their party platforms. That department which is highest in rank and dignity, if one is higher than another, which was created to control and keep in check the other departments whenever they might invade the liberties of the people or the rights of the States, is required to give pledges, which, if they are not formally made, are considered more binding because they are given in silent confidence, that it will receive its construction of the laws and of the Constitution from the party that has elevated its members to the bench.

This is the only possible theory on which the demand for a political judiciary can be founded, and in practice this theory is almost uniformly upheld. The Republican lawyer who aspires to the bench presents as the basis of his claim the credentials of strict and life-long party fealty. When his credentials are approved, his character and abilities are then considered.

The district judge or circuit judge who aspires to the position next above him, refers the President and Senate to the records of his courts to prove that he has never made a decision which presumed to question the constitutionality of an act of Congress

enacted by his party as a party measure; that he has seldom failed to convict a Democrat of a political offense, and has found little or no reason to inquire whether similar offenses have been committed by Republicans; that he has appointed commissioners of bail, and kept them in office, who have used their powers for the purposes of advantage to their party, while they have robbed the treasury of vast sums of money in bills of costs and expenses incurred in the abuse of their jurisdiction; that he has selected partisan supervisors of the elections, and has witnessed the most intolerable oppressions of the people at their hands, under color of such appointments, without its having excited the court even to a mild reproof of their conduct; that he has decided civil causes, and then cut off the right of appeal, by arbitrary rulings, to protect his decisions from review; that he has convicted hundreds of men through verdicts of juries which he knew were selected only to convict in every criminal case that related to political offenses, and has inflicted severe punishments under such conditions when the defendants had no right of appeal, and no other means of redress. If such an aspirant can prove that he has acted judicially on the presumption that every man opposed to the party in power, who is accused of a political offense, was guilty, and was accordingly punished, he has a claim to the office which the political departments of the government will be only too willing to recognize. It is not pretended that the same results would not follow if the Democrats were in power for so long a time as to place the entire personnel of the judiciary under their control. The evil which justice so urgently requires to be remedied is in the doctrine, which is so closely followed in practice, that appointments to the bench must be made alone from the party in power in the government. When the district, and circuit, and supreme courts are all filled up with men from either of the great political parties, the foundations are completed upon which absolutism in government will be established forever. There will be no man on the bench who will venture to differ with his colleagues in upholding a partisan construction of the Constitution or laws. The harsh voice of remonstrance, or of dissent, will no longer disturb the quiet but deadly whisperings of absolute power in the temples of justice. The Constitution thus construed will continue to be the supreme law of the land, and none must venture to be so bold as to question the construction. If the party in power in Congress, and in

the executive department, should say that the republic has become "the nation," and the same party in power in the Supreme Court should answer "yea and amen," then the States and the people who cast half of the entire vote of the country will be required to "accept the situation." If the next step should be that the nation is declared "the empire," it is still the declaration of the supreme law of the land, and the people and the States can only say, "So mote it be."

To place the federal judiciary entirely under the control of one political party in the country is an almost irrevocable step in the direction of absolute government. It will be to establish the initial declaration of that movement which looks to the complete centralization of all power in the federal government, that the laws of Congress within its jurisdiction are supreme under the Constitution, and that Congress has the power to declare and to settle by its edict what are the limits of that jurisdiction. The federal judiciary can only be the conservative and balancing power between the other departments of the government, and the States, and the people that it was intended to be, when it is so far the departmental representative of the people of the entire country that it cannot be justly regarded as the representative of only one of the great political parties into which the people are or may be divided. If one-half of the people of the United States are to be denied all recognition in appointments to the bench, not upon the ground that the judiciary is not a representative department, but on the ground that it must only represent the party in power, then we should at an early day amend the Constitution so that Congress should have less power than it now possesses to change the majority of the bench, and thereby to secure such decisions from the Supreme Court as will suit the purposes of the politicians.

JOHN T. MORGAN.